

Heathrow Express Operating Company Ltd ("HEOC")

Andrew Darbyshire Head of Train Services

Heathrow Airport Ltd - Heathrow Airport Surface Access

James Cornelius – Heathrow Surface Access

In attendance:

Tamzin Cloke Committee Secretary ("Secretary")

Table of Contents

A	Background and Jurisdiction	page 4
B	History of this dispute process and documents submitted	page 4
C	Outcomes sought by the Dispute Parties	page 5
D	Relevant provisions of the Network Code and other documents	page 5
E	Factual Background	page 6
F	Evidence at the hearing	page 11
G	Analysis/Observations/Discussion	page 11
H	Determination	page 15
	Annex "A"	page 16

A Background and Jurisdiction

1. Dispute HAL/TTP002 was raised by MTR by service of a Notice of Dispute on 23 October 2020 in respect of HAL's further decisions in relation to the December 2020 and May 2021 timetables. The dispute was brought on the basis that HAL had failed to include services to Terminal 5 at the Airport, for which MTR holds firm rights. MTR concurrently requested that the hearing be expedited owing to the proximity of the December 2020 timetable change date. At the hearing MTR withdrew its appeal in respect of the May 2021 timetable. MTR accepted that HAL had not as yet issued a final decision on that timetable within the meaning of Condition D4.7 and HAL accepted that when and if such a decision was issued it would be open to MTR to raise an appeal within the meaning of Condition D5 if it was then in some way unhappy with that decision.
2. I was appointed as Hearing Chair on 26 October 2020 and I satisfied myself that the matters in dispute included grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Condition D5.
3. In its consideration of the Parties' submissions and its hearing of the Disputes, the Panel was mindful that, as provided for in HAL ADR Rule A5, it should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.
4. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 4 and as otherwise defined in this determination document:
 - "ADR Rules" mean the HAL Access Dispute Resolution Rules and "Rule" is construed accordingly
 - Decision Criteria means HAL Network Code Condition D4.6
 - "Chapter H" means Chapter H of the HAL ADR Rules
 - "Part D" means Part D of the HAL Network Code and "Condition" is construed accordingly
 - "TTP" means Timetabling Panel
 - "WTT" means Working Timetable

B History of this dispute process and documents submitted

5. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide Sole Reference Documents. The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential interested parties by the Dispute Parties.
6. On 28 October 2020 MTR served its Sole Reference Document, in accordance with the dispute timetable as issued by the Secretary. A further submission ('Appendix 13') arrived on 02 November 2020 and I agreed this could be appended to MTR's submission.
7. On 06 November 2020 HAL served its Sole Reference Document in accordance with the revised dispute timetable as issued by the Secretary on 05 November 2020.
8. Transport for London, Network Rail Infrastructure Ltd., First Greater Western Ltd., and Heathrow Express Operating Company Ltd. declared themselves to be interested parties. All were represented at the hearing.

9. On 09 November 2020 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that so far as there were any relevant issues of law, for the most part the issues to be determined by the Panel concerned the factual application of the Decision Criteria to the Claimant’s applications for Firm Rights to Heathrow Terminal 5 in the December 2020 and May 2021 WTT’s. However, two potential points of law emerged. These were a) whether HAL had made a final decision about the May 2021 WTT within the meaning of the Condition D4.7 and b) in its submission MTR had asserted that HAL had abused a dominant position in contravention of competition law in making its decision. Further submissions were invited on both points and MTR subsequently dropped its assertion under b).
10. Pursuant to directions, on 10 November 2020, MTR served a reply to HAL’s Sole Reference Document and HAL served a response to questions that had been raised with it.
11. The hearing took place on 12 November 2020. The Dispute Parties provided opening statements in writing, responded to questions from the Panel concerning various points and were given the opportunity to make closing statements. The interested parties were given the opportunity to raise points of concern.
12. I confirm that the Panel read all of the papers submitted by the Dispute Parties and I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such materials are specifically referred to or summarised in the course of this determination.

C Outcomes sought by the Dispute Parties

13. In its Sole Reference Document, MTR requested the panel to determine that:
 - (a) for the December 2020 WTT, direct HAL to honour the existing MTR Firm Rights (of two trains per hour in each direction to and from Heathrow Terminal 5) and grant its request for Firm Rights for an additional two trains per hour in each direction to and from Heathrow Terminal 5;
 - (b) should this not be possible, direct HAL to demonstrate that Network Code Conditions D4.6.1 and D4.6.2 were applied appropriately in compiling the December 2020 WTT;
 - (c) for the May 2021 WTT, direct HAL to honour the existing MTR Firm Rights (of two trains per hour in each direction to and from Heathrow Terminal 5) and grant its request for Firm Rights for an additional two trains per hour in each direction to and from Terminal 5;
 - (d) should this not be possible, direct HAL to demonstrate that Network Code Conditions D4.6.1 and D4.6.2 were applied appropriately in compiling the May 2021 WTT.

As noted above, at the hearing MTR withdrew its appeal in respect of the May 2021 WTT.

For avoidance of doubt I should make it clear that MTR did not seek the determination by the Panel of any financial remedies that might flow from any breach of the Code which it might establish, and that the Panel considers that granting Firm Access rights to an operator is outside the powers available to it.

14. HAL asked the Panel to not direct that any of the appealed services run in either the December 2020 or May 2021 WTTs and to find that it had applied the Decision Criteria appropriately in both instances.

D Relevant provisions of the Network Code and other documents

15. The versions of the Part D and the ADR Rules dated 31 December 2017 were applicable to these dispute proceedings. A copy of the Network Code is at Appendix 8 of MTR's Sole Reference Document.
16. An introduction to the Network Code and the Conditions that were particularly relevant to this appeal are set out in Annex "A" to this determination.

E Factual Background

17. To a very large extent the factual background was not in dispute between the parties. I set out that background below. Where necessary I have made findings of fact and I have indicated where I have done so. Thus, mostly the facts are agreed by the parties.
18. By way of introduction let me say that during the hearing it became apparent that in the various dealings between the parties, from about March 2020 onwards, the focus was on practical issues arising from the impact of the Covid-19 pandemic and its effect on rail travel to and from Heathrow Airport. To a very large extent the parties and others sought to, and did agree, pragmatic and temporary steps and did not always have in the forefront of their minds the detailed provisions of Part D and the implications of their rights and obligations under it. As the hearing developed the focus was on Part D because the appeal was made under Part D and Part D sets out the contractual entitlements of the parties. The Panel is obliged to reach a determination 'on the basis of the legal entitlements of the parties and no other basis'.
19. A vital and key part of the Heathrow Airport 'offer' is an effective and efficient road and rail connection with central London. As regards rail, for a number of years, services have been provided by TfL, HEOC and MTR.
20. The focus of this appeal is the services offered by HEOC and MTR. These services operate partly on Network Rail infrastructure and partly on HAL infrastructure. Inevitably, for operational reasons there needs to be a close alignment of the use of those infrastructures. As regards timetabling matters HAL has appointed Network Rail to be its agent, although final decision making remains with HAL.
21. In recent times HEOC ran 4 trains per hour (tph) into Terminal 5 whilst MTR ran 4 tph into Terminal 4. All trains run via the Central Terminal Area (CTA) which acts as an interchange for HEOC passengers requiring Terminal 4 and MTR passengers requiring Terminal 5. The CTA also serves Terminals 2 and 3. (Terminal 1 was decommissioned in 2015 and is currently awaiting demolition). The HEOC services were, and are, express/non-stopping between London Paddington and Heathrow Airport whereas some MTR services stop at intermediate stations which is of particular benefit to travellers and persons working at Heathrow who do wish to travel from Central London.
22. HEOC had the benefit of an agreement providing for the exclusive use of two platforms at London Paddington. At some point, not material to this appeal, HEOC agreed to give up exclusive use of one of those platforms. Evidently, this was to free up capacity at London Paddington during a period of delay to the completion of the Crossrail project. The practical consequence of this was that HEOC 's 4tph required 52 minutes of every hour for its trains to dwell at the platforms at Terminal 5. This method of operation was included in the Dec 20 New Working Timetable as established at D-26.

23. The track access contract (TAC) between HAL and HEOC provides, inter alia, Firm Rights to 4 tph to Terminal 5, and no Firm Rights to passenger services to Terminal 4.
24. The TAC as between HAL and MTR provides, inter alia, for Firm Rights to 4 tph to Terminal 4 and for 2 tph to Terminal 5. However, MTR had not, at D-40, exercised its Firm Rights to Terminal 5. Evidently, MTR had acquired Firm Rights to Terminal 5 in readiness for its service to Terminal 5, if and when, the Crossrail project matured, and it wished to run to that Terminal, albeit the Firm Rights as expressed in the TAC were not caveated in this regard.
25. In March/April 2020 the December 2019 timetable was in operation when the Covid-19 pandemic occurred. The effect of the lockdown had a dramatic effect on road, rail and airline transport services to and from Heathrow Airport. In particular, the number of rail and airline passengers dropped dramatically which resulted in a range of significant consequences. Wide ranging discussions took place between HM Government and rail/airline stakeholder parties as to how to react to the situation and what measures ought to be put in place to cope with the range of issues that had emerged. Material to this appeal was the HAL decision to temporarily close Terminals 3 and 4 to air traffic and to re-locate the airlines using those terminals into Terminals 2 and 5 to be alongside the airlines already using those terminals. At the time of that temporary closure it was not known how long this arrangement would continue.
26. By letter dated 23 April 2020 HAL wrote to MTR to explain that in consequence the CTA would remain open; that Terminal 4 station would be out of use for passenger services but would be kept on 'night mode' for ECS movements, contingencies and test train running. Thus, HAL requested that the MTR services, be transferred from Terminal 4 to Terminal 5 from Saturday 09 May 2020. The letter noted that MTR had Firm Rights for 2 tph in its TAC. In that letter, which is at Appendix 2 of MTR's sole reference document, HAL said that at some future time it may request MTR to run one or two services to Terminal 4. It also said that it would review the arrangement with you "*on an ongoing basis and will notify you when your services can be transferred back to use the Terminal 4 station.*". The effect and the implications of this letter will be discussed in due course. The Panel was not told whether MTR replied to the letter in writing, but it was not in dispute that MTR complied with the request made by HAL.
27. Also, from that date of Saturday 9 May 2020 HEOC reduced its service to Terminal 5 from 4 tph to 2 tph, which created the capacity at Terminal 5 to accommodate the revised MTR operation.
28. Thus, for the remainder of the December 2019 WTT and for the whole of the May 2020 WTT both HEOC & MTR ran (and continue to run) 2 tph to Terminal 5.
29. For some while the expectation, or perhaps hope, of HAL has been that it will re-open Terminal 4 in June 2021 – that is to say, shortly after the commencement of the May 2021 WTT.

The December 2020 timetable

30. On 6 March 2020 MTR submitted its Access Proposal to HAL in accordance with the provisions of Condition D2.4.4. The Access Proposal was for 4 tph in each direction, 7-days per week, between Heathrow Airport Junction and Terminal 4 via CTA. A copy of that Access Proposal is at Appendix 1 to MTR's sole reference document.

31. The Panel was told that HEOC had also submitted an Access Proposal to HAL in accordance with the provisions of Condition D2.4.4. The Panel was not provided with a copy, but it was not in dispute that that Access Proposal included 4 tph to Terminal 5 which, together with dwell times resulted in occupation of the station's platform capacity totalling 52 minutes of every hour.
32. In accordance with Condition D2.6 HAL ought to have compiled the New Working Timetable in respect of the December 2020 WTT between D-40 and D-26 and during that period the Timetable Participants were to have access to the draft New Working Timetable as it emerged. The Panel was not told to what extent, if any, this occurred. What was quite clear was that during this period there were frequent meetings and discussions taking place between the Dispute Parties and other rail industry stakeholders on the evolving consequences of the pandemic and the lockdown and the effect on services on offer and the most effective way in which to provide and maintain an effective and efficient service offer. It was also clear to the Panel that those meetings and discussions were well-intentioned and the aim was the common good.
33. By Condition D2.7 HAL ought to have published the New Working Timetable by D-26 namely, 12 June 2020. It did not do so. It was a little late and was published on or about 26 June 2020. It allocated 4 tph to Terminal 5 to HEOC (none to MTR) and 4 tph to Terminal 4 to MTR (none to HEOC).
34. Condition D3 makes detailed provisions for variations to the WTT including from D-26 onwards. Such variations may be initiated by HAL or by a Timetable Participant.
35. A request for a variation by an operator is termed a "Train Operator Variation Request" (TOVR). The detailed process for TOVRs after D-26 will be considered in due course, but for present purposes it is helpful to note an email dated 4 September 2020 sent by MTR to Network Rail, as agent for HAL. The subject matter was said to be "**MTR Dec 2020 COVID Spot Bid**". MTR sought "*COVID related revisions to the December 2020 timetable.*" Material to this appeal it sought: "*As confirmed by Andy earlier this week, we are bidding to divert 2tph from Heathrow [Terminal] 4 to Terminal 5 all week. All retimings are confined to GW180. This plan is dependent on Heathrow Express operating from one platform at Terminal 5, which we expect to be the case, but they may not yet have confirmed. 227 trains are amended and 18 inter-terminal shuttles are cancelled. Due to the number of changes a PIF has been provided for the West only. F3s and an index are also attached.*" The email is at Appendix 4 to MTRs Sole Reference Document.
36. MTR said that it had been in a position to submit the above request earlier, but did not do so because Network Rail had indicated to the industry in general that it would not be in a position consider such variations until 4 September 2020; and that because of the high volume of such requests it expected to receive, it would be unlikely to be able to respond to all of them within the stipulated 'five working days'. This broad position was confirmed by Ms Nalton of Network Rail who was present at the hearing. It was not clear whether this indication of how Network Rail proposed to deal with variations was given on its own behalf in the wider sense and/or whether it was also given by Network Rail on behalf of HAL in its capacity as HAL's agent. It appears that the intention behind the approach was that submitted variations pertaining to Covid-19 might be considered contemporaneously.
37. Evidently, during the course of the summer, some discussions continued to take place between the Dispute Parties and Network Rail, as agent for HAL, and other industry stakeholders, both on specific issues and on general industry wide issues.

38. By letter dated 9 October 2020 MTR wrote to Network Rail, as agent for HAL, concerning the May 2021 WTT. That letter is not directly material to the subject appeal, but I mention it as a further example of a range of matters under consideration by the parties at that time.
39. By letter dated 21 October 2020 HAL wrote to MTR. A copy is at Appendix 7 of MTR's Sole Reference Document. The letter concerned HAL's understanding of and requirements for both the December 2020 and May 2021 WTTs. As regards the December 2020 WTT, the letter noted that the MTR Access Proposal in its PDNS was to run 4 tph to Terminal 4 and had put in an additional variation request to divert some services to Terminal 5 'when there is available platform capacity at Terminal 5.' That quote is not quite a correct representation of MTR's request. In its TOVR dated 4 September 2020 MTR did not request 2 tph to Terminal 5 'when there is available capacity'. It quite clearly requested 2 tph for the December 2020 WTT, without any qualification. HAL went on to express the preference for a consistent customer experience and a timetable that reflected services which run to one terminal only throughout a day 'e.g. all services on a Friday to Terminal 4 against services which go to both Terminals 4 and 5'. The letter also sought clarification on the Method of Working to be employed for ECS movements to Terminal 4; how the trains will be emptied of passengers at CTA and the implications for dwell times. For reasons I will explain later the Panel concluded that this letter can properly be construed as HAL's final response to the TOVR made in MTR's letter dated 4 September 2020 to divert 2 tph from Terminal 4 to Terminal 5 for the whole of the December 2020 WTT.
40. At the hearing HAL asserted that in arriving at this response it had had regard to the Decision Criteria set out in Condition D6, whether it was contractually obliged to do so or not. On what date(s) it did so was not made clear. However, whenever that was HAL did not write to MTR to share that information with it and did not set out the reasons for the conclusions it had arrived at. The first time HAL did that was Friday 6 November 2020 when it filed and served its Sole Reference Document in response to MTR's appeal. HAL's application of the Decision Criteria is set out in Appendix 3 of its submission.
41. During the course of the hearing, HAL suggested that it might, at some earlier stage, have given MTR an oral explanation of its position. HAL speculated this might have been during the course of one of the many conversations that were taking place between the parties around this time, sometimes on a daily basis. But, HAL did not adduce any evidence to support that suggestion and so I cannot find as a fact that any such conversation(s) took place.
42. MTR's response to HAL's 21 October 2020 letter is dated 23 October 2020. A copy is at Appendix 12 of its Sole Reference Document. The letter recited some of the history and what MTR regarded as the merits of its proposals. The letter then stated an intention to make '*a revised timetable bid for the first four weeks of the [December 2020] timetable, withdrawing its bid to operate to Terminal 4 and submitting a bid for two trains per hour to Terminal 5 (its remaining two trains per hour terminating at Hayes & Harlington)*'. Whether MTR did all or any of those things was not made clear to the Panel.
43. MTR's letter dated 23 October 2020 also stated an intention to initiate an Access Dispute as HAL had failed to honour its Firm Rights to Terminal 5 – and had not demonstrated that the Decision Criteria had been applied appropriately when allocating capacity to TfL Rail and [HEOC] services. A notice of dispute was lodged with the Access Disputes Committee that day.

44. By letter dated 29 October 2020 the Industry Timetable Assurance Programme Management Office (PMO) by its director Chris Curtis said that he had reviewed the December 2020 and May 2021 WTTs and had concluded that as regards December 2020 WTT “... *the current service provision of four trains per hour to Heathrow Terminal 5, comprising two HEOC and two MTR services, is maintained ...*”. The relevance, if any, of that view on the matters before the Panel will be discussed shortly.

Submissions by the Dispute Parties

45. The gist of the case submitted by MTR was to the effect that in accordance with Condition D2.4.4 it submitted its Access Proposal for December 2020 WTT on 6 March 2020. That was for 4 tph in each direction between Heathrow Airport Junction and Terminal 4 via the CTA. On 23 April 2020 HAL requested MTR to divert its services in the December 2019 and May 2020 WTTs to Terminal 5 due to the closure of Terminal 4. MTR complied with that request. It says it saw it as ‘open ended’ because at that time no one knew for how long Terminal 4 might be closed. It thus assumed it might continue into subsequent Timetable Periods.
46. On 4 September 2020 MTR says it submitted a revised Access Proposal to amend the December 2020 WTT by diverting its services from Terminal 4 to Terminal 5. MTR says it “*expected HAL to progress the proposal in accordance with D4.2.2, as HAL had requested that MTR divert to Terminal 5 in their letter of 23 April 2020 and was aware that MTR was planning to increase their service to four trains per hour between Paddington and Heathrow in the near future.*” To pause there, that means that MTR treated its proposal as flowing from the HAL letter of 23 April 2020 and thus that letter was part of the timetable development process for December 2020. In essence it appears to argue that although its revised Access Proposal was made in September 2020 and thus well after D-26, it should be deemed to have been made in April 2020 and thus within the time period permitted for revised Access Proposals to be made (i.e. between D-40 and D-26). If that were to be right then, in consequence HAL, would be obliged to apply the Decision Criteria to the revised Access Proposal as required by Condition D4.2.1.
47. MTR was also critical of HAL in that it failed to publish the New Working Timetable in respect of the December 2020 WTT by D-26. In addition MTR argued that if, contrary to its primary argument, the Panel were to determine that the letter dated 4 September 2020 constituted a TOVR, and not a revised Access Proposal, HAL failed to respond to it within five working days as required by Condition D3.3.6. The Panel was requested to take these shortcomings into account and to have regard to the implications.
48. MTR also submitted that in any event under Condition D4.6.1 when HAL is required to decide any matter in Part D “... *its objective shall be to share capacity on the HAL infrastructure for the safe carriage of passengers in a non-discriminatory, efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).*” It argued that this applied to a decision whether there was or was not a conflict within the meaning of Conditions D3.3.7 and D4.3.1(b).
49. MTR also made a number of submissions concerning the application of the Decision Criteria by HAL and the conclusions it arrived at.
50. HAL submitted that MTR’s TOVR was made on 4 September 2020 and thus was made after the publication of the New Working Timetable. It argued that it was unable to accommodate the request due to capacity constraints at Terminal 5 platforms due to their occupation by HEOC services for 52 minutes out of every hour.

51. Notwithstanding the operational difficulties and minimal capacity at Terminal 5 which flow from the reduced platform capacity for HEOC at Paddington, HAL nevertheless says it applied the Decision Criteria to the request. The detail is set out in Appendix 3 to HAL's Sole Reference Document. I need not go into the detail. In summary HAL concluded:

- (i) The infrastructure was not capable of accommodating MTR's request as a result of capacity constraints at Terminal 5 and therefore there would be a negative impact on the capability of HAL's infrastructure.
- (ii) The spread of services between the CTA and Terminal 5 was appropriately met by MTR operating to the CTA and HEOC operating to Terminal 5 and that there was no unmet demand for further services to Terminal 5.
- (iii) That train service was improved by MTR operating to the CTA as it avoided conflicts with HEOC's Terminal 5 operation and ensured MTR continued to use existing train slots.
- (iv) That journey times would be as short as practicable if MTR bid to the existing timetable as connections to the mainline were ensured. Further, onward connections for any MTR passenger wishing to connect to Terminal 5 are good and journeys would not be unreasonably lengthened.
- (v) That running additional services to Terminal 5 would not improve system integration. Prior to the temporary suspension of services to Terminal 4 services were split with different operators serving each station. This has benefits for Heathrow passengers and HAL considers it important that this continues.
- (vi) That the commercial interests of HAL, MTR and HEOC would be best met by MTR running to the CTA/Terminal 4 and no additional benefit would be derived from running to Terminal 5.
- (vii) That MTR would suffer no financial detriment as a result of stopping services at the CTA as the journey from the CTA to Terminal 5 is within the Heathrow Free Travel Area.
- (viii) That HEOC would suffer financial detriment if it was unable to run four trains per hour to Terminal 5.

These conclusions are contentious and are not accepted by MTR, but it is not necessary to go into the detail for the purposes of this appeal.

52. In discussion HAL had a slightly curious take on the status of its 23 April 2020 request. It regarded it as a TOVR made at HAL's request. HAL could not say where that fitted into the provisions of Part D. HAL considered the question somewhat academic because that event occurred toward the end of the December 2019 WTT and although in practical terms the effect of it carried on into the May 2020 WTT, it did not apply to the December 2020 WTT published on 26 June 2020 which proposed a quite different position and which was overtaken by MTR's TOVR dated 4 September 2020.

F Evidence at the hearing

53. Neither party adduced any written witness evidence in accordance with ADR Rules H33 or H34. Both parties relied on the submissions and assertions made in their respective Sole Reference Documents (and the documents appended thereto) and their respective response documents.

54. During the course of the hearing, several persons present answered questions put to them by members of the Panel and by representatives of the opposite party. Relevant evidential materials have been summarised above.

G Analysis/Observations/Discussion

55. As made clear earlier, the appeal is to be determined on the basis of the legal entitlements of the parties and on no other basis. The legal entitlements (and obligations) of the parties are set out in the TAC they have entered into. The Network Code is a critical component of

the contractual relationship between the parties. The importance of compliance with the Network Code was made clear by the ORR in its appeal decision on TTP1331 and TTP1376 (albeit the similar Network Rail Network Code in those decisions). Key extracts are cited in Annex B to this determination.

56. The Panel considered the starting point to be the provisions of Part D. Whilst in broad terms it is always open to contracting parties to mutually agree to vary the terms of the contract they have entered into there, is no suggestion here by either party to this appeal that there was a mutual agreement to vary, suspend or disapply Part D in whole or in part to any of the timetables mentioned in this determination. Indeed, MTR relies upon provisions in Part D to mount this appeal and HAL relies on provisions in it to defend its position.
57. Given that neither party contends that Part D was varied it was not necessary for the Panel to consider whether, or not, it was open for the parties to make any such variations. Part D of the Network Code is generic and will form part of all TACs entered into by HAL. Part D does not just concern the rights and obligations of the contracting parties; it concerns all Timetable Participants. HAL has an obligation to balance and consider rival rights and contentions. It might be argued that the implied intention of the contracting parties was that Part D would only be varied in very limited circumstances and subject to certain procedures.
58. In timeline terms, the first issue to consider is the HAL request dated 23 April 2020. It was plainly intended to apply to the December 2019 WTT. It was in fact also applied to the May 2020 WTT. At the time the request was made (and complied with) neither party seemingly gave any detailed thought as to how it fitted into the provisions of Part D. It might best be characterised as a Timetable Variation by Consent within the meaning of Condition D3.6.
59. MTR submitted that the effect of the request was open-ended such that it was intended to continue into subsequent timetables until the request was withdrawn. The Panel rejects that submission. There is nothing in the materials put before the Panel to support that supposition. On the contrary, on or about 26 June 2020 HAL published the December 2020 WTT. It did not replicate what was in the request. It quite clearly proposed that MTR was allocated 4 tph to Terminal 4 and no trains into Terminal 5. The Panel infers from this that at that time HAL had an expectation that Terminal 4 might re-open before the commencement of, or perhaps during, the December 2020 WTT.
60. Condition D2.6 provides that between D-40 and D-26 all Timetable Participants shall have access to the evolving New Working Timetable. MTR had the right to make representations to HAL. MTR did not adduce any evidence as to the extent to which it participated in the process. If it had made representations to HAL, then in accordance with Condition D2.6.3, HAL would have been obliged to act in accordance with the duties and powers set out in Condition D4.2 – that is to say the application of the Decision Criteria. However, MTR does not assert that it made any, or any relevant, representations during this period and the Panel finds that it did not do so.
61. MTR complains that HAL was in breach of Network Code D2.7 because the December 2020 WTT was not issued by D-26. The Panel finds there was a breach. The WTT was not issued until on or about 26 June 2020; it was about two weeks late. In its appeal decision in TTP 1331 and TTP 1376 ORR regarded such a breach of the Code as a breach of contract. Such a breach might entitle an aggrieved contracting party to a remedy, perhaps damages, if it can show that it has suffered a foreseeable loss, but ORR had made it clear that a decision on such a question is outside the remit or jurisdiction of a timetable panel hearing an appeal.

Such remedy as an aggrieved party may have lies in a different forum. As noted earlier, MTR did not request this Panel to determine a financial remedy for the alleged breach

62. After HAL published the New Working Timetable it was open for Timetable Participants to submit a TOVR. Network Code Condition D3.3 provides that such a request may be made after D-26. MTR made such a request. It is dated 4 September 2020. MTR submits that it had been in a position to make its request earlier, but did not do so due to a request or suggestion issued by Network Rail. Whether such a request was made by Network Rail in its wider industry role, or whether it was made in its role as agent for HAL or both is not clear. In so far as it may be relevant, the Panel considers the former is the more likely. The basis on which Network Rail made such a request is also not clear. Condition D3.3 plainly grants a Timetable Participant the right to make a TOVR at any time after D-26. If a TOVR is made, Network Rail (or HAL as the case may be) is obliged to respond to it in accordance with Condition D3.3. The Panel considers that it was not open to HAL or Network Rail to issue a legally binding request or suggestion to delay or defer TOVRs. That it did so might amount to a breach of contract, or at least an indication that it did not propose to comply with an obligation under Part D. If MTR suffered a loss or prejudice in complying with that request it may have a remedy elsewhere but it is outside the scope of the jurisdiction of this Panel to make a determination on the point.
63. The Panel considers the more important question is how HAL actually dealt with the TOVR when it was submitted. Condition D3.3.6 provides a mandatory obligation on HAL to notify its acceptance, rejection or modification of a TOVR within strict time limits. By Condition D3.3.9 where HAL rejects or modifies a TOVR it must provide written reasons for doing so. That condition does not specify the time-period within which the written reasons must be provided, but the Panel considers best practice would suggest it should be within the time limits specified within D3.3.6 or within a reasonable time thereafter. What is a reasonable time is fact specific and depends on the individual circumstances of each case.
64. In the instant case the relevant time period for the response was five working days – Condition D3.3.6(g). HAL did not comply with that obligation. HAL's first written response to the TOVR was not made until its letter dated 21 October 2020. MTR complains that this amounts to a further breach of Part D that the Panel should take into consideration when determining this appeal.
65. The Panel is not persuaded that a failure to comply with Condition D3.3.6 is necessarily a breach. Condition D3.3.7 envisages that HAL might fail to notify a response to a TOVR and provides that if it fails to do so, there is a consequence. That consequence is a deemed acceptance of the request provided that acceptance would not give rise to a conflict in one of three situations, namely the New WTT after it is published at D-26, the relevant WTT or the Rules.
66. In the present case that deeming provision does not apply because acceptance of MTR's TOVR would give rise to a conflict with the New WTT as published, albeit at D-24 rather than D-26. Both Mr James and Mr Bagshaw representing MTR fairly and generously accepted that the New WTT allocated to HEOC 4 tph to Terminal 5 with a combined platform occupation of 52 minutes in every hour and that in consequence there was no capacity to accommodate MTR's request for 2 tph in the platforms at Terminal 5.
67. To some extent the Panel finds that Condition D3.3.7 imposes a practical difficulty. A Timetable Participant may well be in limbo if it has not received a response to its TOVR and it may not know whether or not the deeming provisions apply. In this case MTR was aware

that there would be a conflict, but that will not always be the case. Further, in some cases there might be a dispute as to whether or not a conflict really arises. That would be a question of fact. This is a point that the industry might wish to re-visit at some future time.

68. However, whether HAL was or was not in breach of contract by not responding to MTR in writing within five working days is not something which the Panel is entitled to or obliged to take into account. As mentioned earlier, MTR may have a contractual remedy in another forum.
69. By its letter dated 21 October 2020 HAL gave MTR a written response to its TOVR. The letter might have been better drafted, it appears to conflate a number of different concepts and is a further example of the lack of clarity with regard to the application of Part D to the variation of the New WTT once published.
70. The Panel finds that the letter is a final written response to MTR's TOVR. It appears to have been intended to confirm a position indicated in earlier oral conversations between representatives of the parties. The clear inference of the letter is that the request for 2 tph to Terminal 5 is rejected. It plainly assumes all MTR services running to Terminal 4 and it seeks further information about any practical issues arising from the fact that such trains would run into a Terminal 4 station currently closed to passengers. The Panel is reinforced in this view because MTR also took the letter as a final determination within the meaning of Condition D3.3.8 and its immediate response was to notify HAL of an intention to take several steps, including initiating an Access Dispute. MTR gave notice of dispute on 23 October 2020 which was well within the five days provided for in Condition D3.3.8.
71. Condition D4.3 concerns decisions on TOVRs. Condition D4.3.1 provides that HAL shall apply the Decision Criteria in accordance with D4.6 except it shall not accept a TOVR if to do so would give rise to any conflict with a Train Slot already scheduled in the New WTT after it is published at D-26. As mentioned above, the TOVR made by MTR, if accepted, would give rise to such a conflict, and that is not in dispute. The Panel therefore concludes that HAL was not obliged to have regard to the Decision Criteria when responding to the subject TOVR.
72. It was submitted on behalf of MTR that by Condition D4.6.1 where HAL was required to 'decide any matter in this Part D' its objective shall be to share capacity for the safe carriage of passengers in a non-discriminatory, efficient and economical manner. That included a requirement to decide whether a conflict within the meaning of Conditions D3.3.7 or D4.3.1 (b) arose or not. The Panel rejects that submission. Condition D4.3.1(b) expressly provides that HAL shall not apply the Decision Criteria where to do so would give rise to a conflict.
73. The Panel also concludes that the fact HAL may have had regard to the Decision Criteria at some point in the process on a voluntary basis, that does not amount to an estoppel to prevent HAL from relying wholly on the provisions of Condition D4.3.1(b) at the hearing.
74. Both parties put into evidence the letter dated 29 October 2020 issued by the Industry Timetable Assurance PMO. MTR relied upon it as supporting the merits of its request to run 2 tph to Terminal 5. HAL relied upon it to support its case that as a matter of fact HEOC has to occupy the platforms at Terminal 5 for most of the working day.
75. In the event it was not necessary for the Panel to consider the merits of MTR's case and the application of the Decision Criteria and that fact that HAL allocated 4 tph with a combined occupation time of 52 minutes in every hour in the platforms at Terminal 5 was not in dispute.

Accordingly, the Panel was not required to give detailed consideration as to what weight, if any, to give to the PMO letter.

76. Neither party adduced any evidence as to the role and terms of reference of the PMO and legal effect of any views expressed by it, particularly in respect of HAL's network. It is understood the role was created as a result of well published issues arising from the May 2018 WTT. Part D of the Network Code was put into effect before the creation of the PMO and has not been subsequently amended to take it into account. It does not appear that the PMO has any impact on the legal entitlements of the parties as set out in the TAC they have entered into. In these circumstances the Panel did not consider it necessary or appropriate to give any detailed consideration as to what impact or relevance, if any, there may be on views expressed by the PMO. This question is best left to a future timetable panel to consider when the views expressed are, or might be, material and when full evidence about the role of the PMO is put before it and rival arguments developed.

H Determination

77. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is that the appeal shall be dismissed.

78. No application was made for costs.

79. I confirm that so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the ADR Rules.

[SIGNATURE REDACTED]

John Hewitt
Hearing Chair
26 November 2020

HAL Network Code Part D: Timetable

1. Annexed to each TAC entered into between Network Rail and a Train Operator there is a Network Code Part D: Timetable in a common form.
2. Similarly, in the TAC entered into between HAL and MTR there is annexed a Network Code Part D: Timetable. It follows the conventional common form adopted by Network Rail with necessary and consequential amendments substituting HAL for Network Rail where appropriate.
3. In the appeal against a determination of a Timetabling Panel in Reference TTP1331 and TTP1376, the Office of Rail and Road (ORR) stated:

7. The Network Code is a set of rules incorporated into, and forming part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail.

8. Part D sets out the rules under which the timetable for the Network is issued and revised. Part D also sets out the rules under which a Timetable Participant can appeal a decision for determination by the TTP in accordance with the Access Dispute Resolution Rules, which are also contained in the Network Code. Part M provides the process by which a party, dissatisfied with a decision of a TTP in relation to a dispute arising under Part D, can appeal the matter to ORR.

9. Part D imposes on Network Rail a general responsibility to establish a “Working Timetable” and sets out the process for revising the timetable and the respective roles of Network Rail and specified stakeholders (referred to as “Timetable Participants”).

As regards this appeal those observations apply but, of course, it is necessary to substitute ‘HAL’ for ‘Network Rail’.

In accordance with Condition D5.1 of the HAL Network Code this Panel’s determination is required to be in accordance with ADRR, which (through Chapter A, Rule 5) makes clear that its determinations are to be reached on the basis of the legal entitlements of the parties and on no other basis.

4. The provisions of the HAL Network Code that are material to this appeal are as follows:

CONDITION D2 - BI-ANNUAL TIMETABLE REVISION PROCESS

2.6 Timetable Preparation – D-40 to D-26

2.6.1 *During the Timetable Preparation Period (D-40 to D-26) (“Timetable Preparation Period”), HAL shall compile the proposed New Working Timetable.*

2.6.2 *Between D-40 and D-26:*

(a) all Timetable Participants shall have access to the evolving draft of the New Working Timetable either:

(i) by way of “read-only” remote computer access or such other electronic means reasonably requested by a Timetable Participant; or

(ii) to the extent that a Timetable Participant does not have the required systems to facilitate remote computer access, by read-only computer access upon attendance at a location where such access is available as specified by HAL;

(b) HAL shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable, and shall continue to answer enquiries and facilitate and co-ordinate dialogue as stated in Condition D2.3.3.

2.6.3 *In compiling the New Working Timetable, HAL shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.*

2.7 New Working Timetable Publication – D-26

2.7.1 The New Working Timetable shall be published by HAL at D-26, subject only to variations made in the course of the appeal process described in this Condition D2.7.

2.7.2 Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it provided that an appeal is lodged within twenty Working Days of its publication. All such appeals shall be conducted in accordance with Condition D5.

CONDITION D3 – VARIATIONS TO THE WORKING TIMETABLE

3.1 Overview

3.1.1 From D-26 and during the relevant Timetable Period, Timetable Participants may wish to vary either the New Working Timetable, if it is before the Timetable Change Date, or otherwise the Working Timetable on an ad hoc basis by: (a) adding an additional Train Slot on one or more occasions; (b) amending the detail of one or more Train Slots; (c) removing one or more Train Slots. Any such variation is referred to as a “Train Operator Variation”. The process to be followed where a Timetable Participant seeks a Train Operator Variation is set out in Condition D3.3.

3.3 Train Operator Variations after D-26

3.3.1 Where a Timetable Participant seeks a Train Operator Variation, it shall submit to HAL a written request, referred to as a “Train Operator Variation Request”.

3.3.2 A Train Operator Variation Request shall contain a full description of the variation sought and, where it relates to the addition or amendment of any Train Slot to be included in the Working Timetable, shall provide the same information in respect of the variation as would be contained in an Access Proposal (save that where a proposed Train Slot amendment does not involve revision of any information previously supplied to HAL in an Access Proposal for that Train Slot, the Train Operator Variation Request need not repeat that information).

3.3.3 From D-26 and during the relevant Timetable Period, a Timetable Participant is entitled to make a Train Operator Variation Request and HAL shall have the power to accept, reject or modify it, subject to the timeframes set out in Condition D3.3.6 below and acting in accordance with Condition D4.3.

3.3.4 Where a Train Operator Variation Request is received:

- (a) on any day which is not a Working Day; and/or
- (b) after 10:00 hours on a Working Day; it shall be deemed to have been received on the next Working Day thereafter.

3.3.5 For the purposes of calculating HAL’s response time to a Train Operator Variation Request set out in Condition D3.3.6, the day of HAL’s receipt of a Train Operator Variation Request is described as day 1 and each Working Day following this adds a day onto the description. For example, the Working Day after the day of receipt of the request is day 2.

3.3.6 HAL shall notify its acceptance, rejection or modification of a Train Operator Variation Request, by the following latest times:

- (a) ... (f)
- (g) where (a), (b), (c), (d), (e) or (f) do not apply, within five Working Days of receipt of the request.

3.3.7 Where HAL fails to notify its response to a Train Operator Variation Request in accordance with Condition D3.3.6 and the request, if accepted, would not give rise to any conflict with:

- (a) the New Working Timetable after it is published at D-26; or
- (b) the relevant Working Timetable; or
- (c) the Rules,

it shall be deemed to have accepted the request.

3.3.8 Where a Timetable Participant is dissatisfied with any final decision of HAL in response to a Train Operator Variation Request, it may appeal against that decision in accordance with Condition D5, provided that it submits its appeal as soon as reasonably practicable and, in any event, no later than five Working Days after it is notified of the relevant decision by HAL.

3.3.9 Where HAL rejects or modifies any Train Operator Variation Request it must provide written reasons for its decision.

3.6 Timetable Variations by consent

3.6.1 Notwithstanding anything stated in this Condition D3, where HAL and all affected Timetable Participants have so consented in writing, a Timetable Variation may be made without the need for compliance with such of the requirements of this Condition D3 as are specified in the consent. Such a variation is referred to as a "Timetable Variation by Consent".

CONDITION D4 – DECISIONS BY HAL

4.1 Decisions concerning the Rules

4.1.1 In conducting the processes set out in Condition D2.2 by which the Rules are revised on a bi-annual basis (including the amendment process described in Condition D2.2.7), HAL shall make all decisions by application of the Decision Criteria in the manner set out in Condition D4.6.

4.2 Decisions arising in the preparation of a New Working Timetable

4.2.1 In compiling a New Working Timetable in accordance with Condition D2.6, HAL shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2.

4.3 Decisions concerning Train Operator Variations

4.3.1 In responding to a Train Operator Variation Request, HAL shall conduct itself as follows:

- (a) it is entitled to exercise its Flexing Right;
- (b) when exercising its power set out in Condition D3.3.3 HAL shall apply the Decision Criteria in accordance with Condition D4.6 except that it shall not accept a Train Operator Variation Request if to do so would give rise to any conflict with any Train Slot already scheduled in:
 - (i) the New Working Timetable after it is published at D-26 or the relevant Working Timetable; or
 - (ii) the Rules;
- (c) where the Decision Criteria have been applied as set out in sub-paragraph (b) immediately above but two or more such requests would give rise to conflict were they to be accepted, they shall be prioritised in the order in which they were submitted and any conflict resolved accordingly.

4.6 The Decision Criteria

4.6.1 Where HAL is required to decide any matter in this Part D its objective shall be to share capacity on the HAL infrastructure for the safe carriage of passengers in a non-discriminatory, efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective").

4.6.2 In achieving the Objective, HAL shall apply any or all of the considerations in paragraphs (a)-(h) below ("the Considerations") in accordance with Condition D4.6.3 below:

- (a) maintaining, developing and improving the capability of the HAL infrastructure;

- (b) that the spread of services reflects demand;
- (c) maintaining and improving train service performance;
- (d) that journey times are as short as reasonably possible;
- (e) maintaining and improving an integrated system of transport for passengers;
- (f) the commercial interests of HAL (apart from the terms of any maintenance contract entered into or proposed by HAL) or any Timetable Participant of which HAL is aware;
- (g) mitigating the effect on the environment; and
- (h) enabling operators of trains to utilise their assets efficiently.

4.6.3 When applying the Considerations, HAL must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and HAL. Where, in light of the particular circumstances, HAL considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

4.6.4 The Objective and the Considerations together form the Decision Criteria.

4.7 Finality of decisions

4.7.1 Save where expressly otherwise stated in this Part D, where HAL has announced a final decision in respect of any process regulated by this Part D, that decision shall be:

- (a) binding on Timetable Participants save to the extent that it is changed by an appeal authorised by this Part D;
- (b) binding on HAL save to the extent that:
 - (i) HAL is expressly permitted by any provision of this Part D to deviate from or amend that decision; or
 - (ii) a decision is changed by an appeal authorised by this Part D.

CONDITION D5 - APPEALS

5.1 Appeal in accordance with the ADRR

5.1.1 Where an appeal is expressly authorised by this Part D, a Timetable Participant may refer a decision for determination by a Timetabling Panel in accordance with the ADRR.

5.1.2 Where a deadline for bringing an appeal is expressly stated in this Part D, an appeal in respect of such a decision must be made by the stated deadline. Otherwise, an appeal brought pursuant to this Part D must be made:

- (a) within five Working Days of receipt of the decision to which objection is made; or
- (b) where the period referred to in (a) includes Christmas Day, within ten Working Days of that decision.

5.3 Powers of dispute resolution bodies

5.3.1 In determining any appeal pursuant to this Part D, any Timetabling Panel or the ORR (as the case may be) may exercise one or more of the following powers:

- (a) it may give general directions to HAL specifying the result to be achieved but not the means by which it shall be achieved;
- (b) it may direct that a challenged decision of HAL shall stand;
- (c) it may substitute an alternative decision in place of a challenged decision of HAL;

provided that the power described in (c) above shall only be exercised in exceptional circumstances.